88-631

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

[redacted] COX ENTERPRISES, INC., d/b/a "WACO TRIBUNE HERALD," AND MARY ANN KREPS,

Petitioners,

v.

JOHN B. GUINN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

1) Whether a newspaper article that mistakenly accuses a justice of the peace of criminal conduct must specifically identify the office held by the official to come within the actual malice standard of *New York Times* v. *Sullivan*?

2) Whether the rule of *New York Times* v. *Sullivan* is applicable to a local, elected public official who is not necessarily known beyond the confines of his community?

LIST OF PARTIES TO THE PROCEEDING*

The Petitioners joining in this petition for a writ of certiorari are:

1) Texas Newspapers, Inc.
2) Cox Enterprises, Inc., d/b/a
3) "Waco Tribune-Herald"
4) Mary Ann Kreps

The Respondent is John B. Guinn

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* Petitioner Texas Newspapers, Inc. was an assumed named for Petitioner Cox Enterprises, Inc. and has since been dissolved. Pursuant to Rule 28.1, there are no parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioners Texas Newspapers, Inc. and Cox Enterprises, Inc.

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No. _____

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC. d/b/a "WACO TRIBUNE-HERALD," AND MARY ANN KREPS

Petitioners,

v.

JOHN B. GUINN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas ("Texas Court of Appeals") in No. B14-86-674-CV issued on July 2, 1987.

OPINIONS BELOW

The opinion of the Texas Court of Appeals is reported at 738 S.W.2d 303 (Tex. App.-Houston [14th Dist.] 1987, writ denied) and is printed in the Appendix ("App.") 1a-6a. The Texas Court of Appeals reversed a judgment of the 80th Judicial District Court of Harris County, Texas ("Texas District Court") in No. 84-27303. A copy of the unreported judgment of the Texas District Court is printed at App. 25a-26a. The Supreme Court of Texas denied Petitioners' application for writ of error with the notation "Writ Denied" by an unreported order printed at App. 8a-9a, and overruled Petitioners' motion for rehearing by an unreported order printed at App. 10a-11a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1987. App. 7a. The Supreme Court of Texas denied Petitioners' application for writ of error on January 6, 1988, and overruled Petitioners motion for rehearing on July 13, 1988. App. 8a-11a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const. amend. I sets forth in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The Due Process Clause of U.S. Const. amend. XIV sets forth:

   No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

3. The Supremacy Clause of U.S. Const. art. VI sets forth in part:

   This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of a state to the contrary notwithstanding.

STATEMENT OF THE CASE

1. Factual and Procedural Background

This controversy involves the application of the First Amendment as interpreted by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (hereinafter *New York Times*). Respondent, John B. Guinn ("Guinn"), filed this libel suit on June 6, 1984 against Petitioners, Texas Newspapers, Inc., Cox Enterprises, Inc. d/b/a "Waco Tribune-Herald" and Mary Ann Kreps, as a result of a newspaper article that mistakenly identified Guinn as a criminal defendant. The newspaper article made the subject of the suit appeared in the January 24, 1984 edition of the "Waco Tribune-Herald," a daily newspaper that serves Waco, Texas and surrounding communities.

At the time the article appeared, Guinn was an elected Justice of the Peace serving in Coryell County, Texas and also an appointed Associate City Judge presiding in Copperas Cove, Texas.[1] App. 18a-21a.

The article mistakenly referred to Guinn as having been charged with felony theft:

> John B. Guinn, 44, of Copperas Cove was given a five-year probated sentence and ordered to pay restitution for theft on a government reservation.

App. 2a. In fact, Guinn had acted as counsel for Michael B. Fuller at the hearing referenced. The mistake happened when the reporter, Mary Ann Kreps, inadvertently transcribed the name of Guinn instead of his client while reviewing court records in connection with reporting matters of public interest at the federal courthouse. App. 22a-24a.

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[1] Waco, Texas is located in McLennan County which is contiguous with Coryell County, the home of Guinn. Guinn's hometown, Copperas Cove, is approximately 100 miles from Waco.

When the mistake was discovered, the newspaper promptly printed a retraction.

Petitioners moved for summary judgment in the Texas District Court based upon the deposition testimony of Guinn, establishing his status as a public official, and the affidavit of Mary Ann Kreps, establishing a lack of malice by demonstrating that the article was the result of nothing more than an inadvertent mistake in transcription. App. 14a-24a.

The Texas District Court granted Petitioners' summary judgment motion (App. 25a-26a.), and Guinn appealed to the Texas Court of Appeals which reversed and remanded the case for trial. The Texas Supreme Court denied Petitioners' application for writ of error and overruled their motion for rehearing. The Texas Court of Appeals granted Petitioners' application for stay of the mandate pending the filing of this Petition. App. 12a-13a.

2. The Holding Of The Texas Court of Appeals

Although Guinn conceded that he was a "*per se* elected public official" (App. 3a.), the Texas Court of Appeals held that a fact issue was presented as to Guinn's status as a public official within the meaning of *New York Times* because the article did not "expressly" relate to his official conduct or performance of his official duties. 738 S.W.2d at 305, App. 4a.

In *New York Times,* this Court ruled that a public official could not recover damages for a defamatory article relating to his official conduct without a showing of actual malice. 376 U.S. at 270. The Texas Court of Appeals has limited the scope of *New York Times* to exclude most local, elected officials from the application of the actual malice standard. First, the Texas Court of Appeals requires a defamatory article to specifically identify the official's political office. Since the article in this case did not reference Guinn as

"Judge Guinn" or otherwise identify his political offices, the court determined that a fact issue existed as to whether Guinn was a public official within the purview of *New York Times.* 738 S.W.2d at 305, App. 4a.

Alternatively, the Texas Court of Appeals requires that an elected public official must be known outside the confines of his community to fall within *New York Times.* Specifically, after acknowledging that this Court has interpreted the official conduct concept broadly, the Texas Court of Appeals held that "its application does not include as a matter of law an individual who was proved only to be an elected justice of the peace[2] in his own community." 738 S.W.2d at 305, App. 4a-5a.

REASONS FOR GRANTING REVIEW

The questions presented are of exceptional constitutional importance to publishers who rely upon the First Amendment privilege as interpreted by this Court in *New York Times.* The Texas Court of Appeals' judgment has far reaching implications that are worthy of this Court's consideration. The judgment allows any local official to maintain a libel suit, despite the lack of malice on the part of the publisher, simply if the article fails to identify his political office. In this regard the Texas Court of Appeals' holding is in direct conflict with this Court's holdings in *Ocala Star-*

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[2] Justice courts in Texas have jurisdiction over civil matters where exclusive jurisdiction is not in the district or county courts and where the amount in controversy is not more than $2,500.00. *See* Tex. Const. art. V, § 19 (Vernon's Supp. 1988); Tex. Gov't Code § 27.031 (Vernon's 1988). It has exclusive jurisdiction for cases of forcible entry and detainer and foreclosures of mortgages or enforcement of liens where the amount in controversy is within its jurisdiction limits. *Id.* The justice court also has criminal jurisdiction in cases where the fine imposed by law may not exceed $200.00. Tex. Code Crim. Proc. Ann. art. 4.11 (Vernon's 1977).

Banner Co. v. *Damron,* 401 U.S. 295 (1971) and *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265 (1971). Under the Supremacy Clause, the Texas Courts are bound by the decisions of this Court interpreting the First Amendment.

The judgment also restricts the application of the actual malice standard of *New York Times* to those elected officials who have achieved notoriety beyond the confines of their communities. The judgment draws an unprecedented distinction between local, elected officials and those officials who have broad name recognition. The judgment would thus allow local, elected officials to maintain libel suits under an ordinary negligence theory but require high-ranking or well-known public officials to establish actual malice. This Court has not so restricted the application of the *New York Times'* actual malice standard. *See Rosenblatt* v. *Baer,* 383 U.S. 75, 85 (1966).

1. The Texas courts are bound by the decisions of this Court that interpret the First Amendment of the United States Constitution and the *New York Times* rule.

By reading into the *New York Times* rule a requirement that a false statement must identify an official's political office, the Texas Court of Appeals impermissibly encroached upon the First Amendment protection afforded the press. A state court does not have the authority to abridge constitutional rights guaranteed by the United States Constitution, as those rights have been interpreted by the United States Supreme Court. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816). *Martin* established the United States Supreme Court as the ultimate authority to interpret federal statutory and constitutional law, and state court decisions contrary to its

interpretation are unconstitutional and must be declared a nullity. *Id.* at 337-344.[3]

In *New York Times*, this Court limited the power of the states to award damages in libel cases involving public officials. The Texas Court of Appeals' judgment violates the Supremacy Clause of article VI of the United States Constitution because it disregards this Court's interpretation of the "official conduct" requirement of *New York Times*. *See Henry* v. *Rock Hill*, 376 U.S. 776, 780-81, n.1.3 (1964). This Court has broadly interpreted the "official conduct" requirement of *New York Times* to include "anything which might touch on an official's fitness for office." *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 274 (1971) (hereinafter *Monitor Patriot*). This Court has made clear that where, as here, an alleged defamatory article charges a public official with criminal conduct, the article relates to the official's fitness for office as a matter of constitutional law. *Monitor Patriot*, 401 U.S. at 277:

> We . . . hold as a matter of constitutional law that a charge of criminal conduct, *no matter how remote in time or place*, can *never* be irrelevant to an official's or candidate's fitness for office for purposes of application of the knowing falsehood or reckless disregard rule of *New York Times Co.* v. *Sullivan*.

401 U.S. at 277 (emphasis added); *Accord Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300-301 (1971) (hereinafter *Ocala Star-Banner*); *Goodrick* v. *Gannett Co., Inc.*, 500

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[3] The court in *Martin* held that the United States Supreme Court has appellate jurisdiction over decisions by state tribunals involving constitutional issues. The court reasoned: "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher more dangerous act of sovereign power." *Id.* at 344.

F.Supp. 125, 126 (D. Del. 1980). The Court's holdings in *Monitor Patriot* and *Ocala Star-Banner* are mandatory and, by virtue of the Supremacy Clause, are binding upon the Texas Court of Appeals. *See Henry* v. *Rock Hill, supra*; *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

The Court's decision in *Ocala Star-Banner* is squarely on point with the facts of this case. There, the article mistakenly reported that Leonard Damron, a local mayor and candidate for the office of county tax assessor, had been indicted for perjury, when in fact it was his brother who had been indicted. As here, the article did not refer to Damron as "Mayor Damron" and it did not otherwise refer to his official duties as mayor. Further, Damron, like the Respondent in this case, urged that the *New York Times* rule did not apply because the article did not relate to his "official conduct". The Court, following *Monitor Patriot,* rejected this argument and found that the charge of perjury in the article related to Damron's official conduct as a matter of constitutional law. *Ocala Star-Banner,* 401 U.S. at 300. Specifically, the Court articulated:

> [U]nder any test we can conceive, the charge that a local mayor and candidate for a county elective post has been indicted for perjury in a civil rights suit is relevant to his fitness for office.

Id. at 300-301.

By reversing the summary judgment in this case, the Texas Court of Appeals ignored this Court's interpretation of the First Amendment as it applies to libel suits brought by public officials. The article in this case charges Guinn with the crime of felony theft. 738 S.W.2d 303, App. 1a-2a. Thus, pursuant to *Monitor Patriot* and *Ocala Star-Banner,* the article relates to Guinn's official conduct as a matter of constitutional law. *Monitor Patriot,* 401 U.S. at 277; *Ocala Star-Banner,* 401 U.S. at 300-301. The Texas Court of

Appeals cannot lawfully disregard the holdings of *Monitor Patriot* and *Ocala Star-Banner*. *See Chesapeake Ohio Ry. Co.* v. *Martin*, 283 U.S. 209, 220 (1931).[4] Accordingly, the Texas Court of Appeals' decision abridges this Court's interpretation of the "official conduct" requirement of the *New York Times* rule and, for this reason, the Texas Court of Appeals' holding in this case should be declared unconstitutional and a nullity.

2. A public official need not be known beyond the confines of his community for the actual malice standard of *New York Times* to apply.

The issue of whether a plaintiff bringing a libel suit is a public official within the meaning of *New York Times* is generally a question of law. *See Rosenblatt*, 383 U.S. 75, 88 (1966). As the Court in *Rosenblatt* explained:

> Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for constitutional decisions.

Id. at 88, n.15. Here, Guinn and the Texas Court of Appeals conceded that he was a public official. 738 S.W.2d at 305, App. 3a-4a.

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[4] The Texas Court of Appeals ignored this Court's interpretation of the "official conduct" requirement of the *New York Times* rule and cited the Texas Supreme Court's holding in *Foster* v. *Laredo Newspapers, Inc.*, 541 S.W. 2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). *Foster*, however, is not applicable on its facts. First, the article in *Foster* did not charge Foster, a consulting engineer and an elected county surveyor, with criminal conduct. Second, the article in *Foster* was expressly limited to Foster's activities as a private, consulting engineer. *Id.* at 813. The Texas Court of Appeals construed *Foster* out of context and applied it in a manner that encroaches upon this Court's interpretation of the First Amendment in *Monitor Patriot* and *Ocala Star-Banner*.

However, the Texas Court of Appeals concluded that a "fact issue" was presented as to Guinn's public official status because nothing in Petitioners' proof at the summary judgment hearing indicated that Guinn was known as a public official outside of Coryell County, Texas, the county where he served as a justice of the peace. 738 S.W.2d at 305, App. 4a-5a. There is no constitutional requirement that a public official must be known outside the confines of his community in order for an alleged defamatory article to relate to his "official conduct" for purposes of applying the actual malice standard in *New York Times.* In fact, in *New York Times* the Court deemed an elected commissioner of the City of Montgomery, Alabama to be a "public official" for purposes of applying the actual malice standard, even though the advertisement made the basis of the libel claim did not mention the official by name, much less his political office. 376 U.S. at 257-58, 288. Further, the advertisement appeared in a newspaper published in New York City approximately 1,000 miles away.

The operative test for public official status is found in *Rosenblatt.* In *Rosenblatt,* the Court mandated that the public official designation be applied:

> [A]t the very least to those among the hierarchy of government employees who have, or appeared to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Id. at 85. The Court attached particular significance to whether the public has an "independent interest in the qualifications and performance" of the government employee. *Id.* The public official designation for purposes of applying the actual malice standard has never been dependent on the official's notoriety or name recognition.[5]

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[5] The following is a list of cases where local officials have been held to be "public officials": *New York Times Co.* v. *Sullivan,*

Guinn is an elected justice of the peace, responsible for presiding over both criminal and civil judicial proceedings. The public has an independent interest in the qualifications and performance of judges who are elected to office. All elected officials are "public" since by running for office they place their character and behavior before the public for consideration. *See Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *Gertz* v. *Welch,* 418 U.S. 323, 342 (1974). By definition then, Guinn is a "public official" within the meaning of *New York Times.*[6]

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376 U.S. 254 (1964) (city commissioner of Montgomery Alabama); *Garrison* v. *Louisiana,* 379 U.S. 64 (1964) (district judges in the parish of New Orleans, Louisiana); *Pape* v. *Time, Inc.,* 354 F.2d 558 (7th Cir. 1965), *cert denied, Time, Inc.* v. *Pape,* 384 U.S. 909 (1966) (local deputy chief of detectives and lieutenant of police); *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295 (1971) (city mayor and candidate for the office of county tax assessor); *Goodrick* v. *Gannett Co., Inc.,* 500 F.Supp. 125 (D. Del. 1980) (assistant public defender in Cecil County, Maryland); *Roos* v. *News-Journal Co.,* 228 A.2d 531 (Del. 1967) (justice of the peace and his clerk). *Angel* v. *Ward,* 43 N.C. App. 288, 293, 258 S.E.2d 788, 791 (1979) (internal revenue agent); *Eadie* v. *Pole,* 91 N.J. Super. 504, 221 A.2d 547 (1966) (municipal tax assessor); *Press, Inc.* v. *Verran,* 569 S.W.2d 435 (Tenn. 1978) (junior social worker). *Dattner* v. *Pokoik,* 81 A.D.2d 572, 437 N.Y.S.2d 425 (1981) (village building inspector); *Brown* v. *Kitterman,* 443 S.W. 2d 146 (Mo. 1969) (manager of county community center); *Silbowitz* v. *Lepper,* 32 A.D.2d 520, 299 N.Y.S.2d 564 (1969) (supervisor of branch post office); *Clawson* v. *Longview Publishing Co.,* 91 Wash. 2d 408, 589 P.2d 1223 (1979) (administrator of county motor pool).

[6] Once there has been a determination that a libel plaintiff is a public *official,* it is immaterial, for purposes of applying the actual malice standard, that he may also be a public *figure.* The burden of proof for both public officials and public figures is legally equivalent; both must establish actual malice; that is actual awareness of falsity or reckless disregard of falsity, by clear and convincing evidence. *New York Times,* 376 U.S. at 279-80; *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (1967) (expanded the *New York Times* rule to public figures).

The Texas Court of Appeals completely ignored the test in *Rosenblatt.* Instead, the Texas Court of Appeals applied the test for "pervasive" or "all-purpose" public *figures.* 738 S.W.2d at 305, App. 4a-5a; *See Gertz,* 418 U.S. at 342-345.[7]

The Texas Court of Appeals has created a dangerous precedent, which is undeniably unconstitutional under *Rosenblatt.* If the privilege in *New York Times* is to be applied to *all* public officials, the decision of the Texas Court of Appeals cannot stand.

"Public figures" are distinguished from the community in general because they generally enjoy greater access to the media and have a more realistic opportunity to counteract false statements than private individuals. *Gertz,* 418 U.S. at 344. In this manner, they are like public officials. *Id.* The Texas Court of Appeals' holding requires libel defendants to establish that public officials are "notorious" and in essence vitiates the *New York Times* rule, replacing it with the public figure test of *Gertz* v. *Welch.*

Based on the holding of the Texas Court of Appeals, the *Dallas Morning News* would not be protected for publishing an article about a city councilman in Fort Worth unless he was known outside his community. Likewise, the *Washington Post* would have to exercise extreme caution in publishing an article about any member of the Texas judiciary unless it could be shown that such member had achieved notoriety outside Texas.

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[7] The test for "pervasive" or "all purpose" public figures is whether a person has achieved such fame or notoriety that he is known outside the confines of his community. *See Gertz,* 418 U.S. at 342; *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971). The same test does not apply to public officials. *Compare Rosenblatt,* 388 U.S. at 85.

The holding of the Texas Court of Appeals creates a new standard in conflict with *New York Times* and its progeny. If followed by other courts, this decision will vitiate the protection afforded the press when commenting on the qualifications for office of elected public officials. Indeed, under the Texas Court of Appeals' standard, Senator Dan Quayle of Indiana could have maintained a suit for libel in Texas without a showing of actual malice at any time prior to his being nominated for Vice President on the Republican ticket and thrust into the vortex of public events.

3. Granting the writ will preserve the objectives of the First Amendment protection granted the press in *New York Times*

The Court's rationale supporting the *New York Times* rule favors the application of actual malice standard to Guinn's libel suit and any other local, elected official who seeks actual and exemplary damages for a false statement that relates to his fitness for office. In *New York Times,* the Court established a firm commitment "that debate on public issues should be uninhibited, robust and wide-open. . . ." 376 U.S. at 268. The Court thus determined that an unintentional, false statement concerning a public official is worthy of protection under the First Amendment because an "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the breathing space they need to survive." *Id.* at 271-72.

Speech concerning elected officials lies at the core of the First Amendment, for such speech is essential to the informed exercise of the franchise by the electorate. As a practical matter, if publishers must weigh the degree of notoriety enjoyed by elected officials before publishing articles concerning such officials, the press's role in keeping the electorate informed as to the actions and qualifications of public officials will suffer. *See New York Times.*

Publishers must be able to rely on the uniform application of the *New York Times* rule in order for the rule to serve its purpose. The Court has emphasized that since the "decision in *New York Times* . . . draws its force from the constitutional protections afforded free expression . . . [t]he standards that set the scope of its principles cannot . . . be such that the constitutional limits of free expression in the Nation would vary with state lines." *Rosenblatt*, 383 U.S. at 84. The unfettered right to publish matters of public concern is diminished if the application of the rule can depend on inconsequential distinctions, such as the level of an official's notoriety or the identification of his office in an article.

Certiorari must be granted in this case to prevent the courts of Texas from adopting a standard less protective of speech than the standards formulated by this Court and adhered to by the courts of other jurisdictions.

The Texas Court of Appeals' holding cannot withstand constitutional scrutiny. A local, elected official, such as Guinn, cannot recover damages in a libel suit, absent a showing of actual malice, for an article that mistakenly charges him with criminal conduct. *See Monitor Patriot* and *Ocala Star-Banner.* Petitioners respectfully urge this Court to grant this Petition for Certiorari to preserve Petitioners' privilege under the First and Fourteenth Amendments of the United States Constitution.

CONCLUSION

Certiorari is appropriate where necessary to determine whether a state court has properly applied a prior Supreme Court decision. *See, E. G. Hankerson* v. *North Carolina,* 432 U.S. 233 (1977). Here, the holding of the Texas Court of Appeals below is directly at odds with this Court's interpretation of the First Amendment of the United States Constitution.

The Petition should be granted.

Respectfully submitted,

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One Ravina Drive, Suite 1300
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88-631

No. _____

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

[redacted] COX ENTERPRISES, INC., d/b/a "WACO TRIBUNE HERALD," AND MARY ANN KREPS,

Petitioners,

v.

JOHN B. GUINN,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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APPENDIX A

COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT

JOHN B. GUINN,

Appellant,

v.

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC., MARY ANN KREPS, AND TEXAS NEWSPAPERS, INC. AND COX ENTERPRISES, INC. d/b/a/ WACO TRIBUNE-HERALD,

Appellees.

No. B14-86-674-CV.

Appeal from the 80th District Court
of Harris County
Trial Court No. 84-27303

OPINION

Appellant, John B. Guinn (Guinn), filed a defamation action against appellees, Texas Newspapers, Inc., Cox Enterprises, Inc., Mary Ann Kreps, and Texas Newspapers, Inc. and Cox Interprises, Inc. d/b/a/ Waco Tribune-Herald (the newspaper, Kreps and/or appellees). The trial court granted summary judgment in favor of appellees. We reverse the judgment of the trial court and remand the cause for trial.

Guinn's suit against appellees resulted from an inaccurate article written by Kreps, a legal reporter for the Tribune-Herald, which was published by the newspaper. The article in question falsely stated that Guinn, who was both a practicing attorney and elected justice of the peace in Coryell County, Texas, had been convicted of felony theft. According to Kreps' affidavit, included in the summary judgment

proof, the reporter had unintentionally transcribed Guinn's name in place of that of the defendant whom Guinn represented. The article in its entirety read as follows:

> John B. Quinn, 44, of Coperas Cove was given a five-year probated sentence and ordered to pay restitution for theft on a government reservation.

Guinn alleged in his first amended original petition that the published item was libelous since it imputed unfitness for his profession as a member of the State Bar of Texas; injured him in his profession; held him up to public ridicule and disgrace; and intended to cause his reputation to be impeached. He sought $50,000 in general and special damages plus an additional $100,000 in punitive damages.

Appellees moved for summary judgment on the grounds that since Guinn was a "public figure" [sic] the *New York Times* "actual malice" standard applied. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964).[1] The motion stated further that the summary judgment proof, through Mary Ann Kreps' affidavit, established the article was published without actual malice.

The trial court granted summary judgment in favor of appellees. Guinn now appeals the renditon of summary judgment in two points of error. He claims summary judgment was improperly granted because the trial court erred in holding him to be a public figure as a matter of law and in finding an absence of malice as a matter of law. Guinn contends there are genuine issues of material fact as to his status as a public figure, and as to the absence of actual malice. We agree with his first contention. In view of our

---

[1] The *New York Times* rule permits recovery by a public official in a defamation suit if the plaintiff can prove the defamatory statement was made with constitutional or "actual malice," *i.e.,* with knowledge of the statement's falsity or with reckless disregard for its truth or falsity. *New York Times Co.* v. *Sullivan,* 376 U.S. at 279-80, 85 S. Ct. at 725-26.

disposition of point of error one, it is unnecessary to discuss the merits of Guinn's second point.

In his first point of error, Guinn asserts the trial court erred in holding him a public figure as a matter of law. Appellees' summary judgment motion alludes only to Guinn's "public figure" status. The motion fails to claim alternately that Guinn was a public official. However, appellees take the position that "public figures" and "public officials" are legally equivalent for purposes of the *New York Times* rule, as both types of plaintiffs must establish by clear and convincing evidence that a libelous statement was published with actual malice. Guinn concedes he was a "*per se,* elected public official" in Coryell County by virtue of holding governmental office. *See Gertz* v. *Welch,* 418 U.S. 323, 94 S. Ct. 2997 (1974). Therefore, appellees argue, the issue of whether or not Guinn was a public figure is irrelevant, since his public official status automatically invokes the actual malice standard.

Assuming the validity of appellees' argument of legal equivalence, we nevertheless hold the summary judgment proof is insufficient to establish as a matter of law Guinn's status as either a public figure or a public official. We discuss only Guinn's "public official" status, since he was clearly an elected official. Appellees have submitted no proof as to his "public figure" status. *See Curtis Publishing Company* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130, 87 S. Ct. 1975 (1967).

In order to entitle them to summary judgment as a matter of law, appellees must meet their burden of showing no genuine issue of material fact exists as to Guinn's status as a public official. Tex. R. Civ. P. 166-A; *City of Houston* v. *Clear Creek Basin Authority,* 589 S.W.2d 671, 678 (Tex. 1979); *Beaumont Enterprise & Journal* v. *Smith,* 687 S.W.2d 729, 730 (Tex. 1986). Moreover, every reasonable

inference must be indulged in favor of Guinn, the nonmovant, and any doubts resolved in his favor. *Hudnall* v. *Tyler Bank and Trust Company,* 458 S.W.2d 183, 185 (Tex. 1970).

Applying those standards, we hold the summary judgment proof raises genuine issues of material fact as to Guinn's status as a public official, precluding summary judgment. Guinn's deposition, included in appellees' proof, establishes him as a justice of the peace in Coryell County. He was appointed in 1981 to fill an unexpired term, was subsequently elected in November 1981, and was holding office when the newspaper published the allegedly defamatory piece in Waco on January 23, 1984. He was thus undisputedly a public official in Coryell County.

However, it is also undisputed that the newspaper item did not refer to Guinn in his official capacity; it named him "John B. Guinn" rather than "Judge Guinn." Furthermore, the content of the article did not expressly relate to Guinn's official conduct as a justice of the peace, nor was it concerned with Guinn's performance of his official duties. *Foster* v. *Laredo Newspapers, Inc.,* 541 S.W.2d 809, 814-15 (Tex. 1976). Appellees cite case law for the proposition that no charge is irrelevant to Guinn's official conduct, since there is always an implied relationship to his position.[2] Therefore, they claim, the actual malice standard must apply. Although the United States Supreme Court has interpreted the official conduct concept broadly, we hold its application does not include as a matter of law an individual who was proved only to be an elected justice of the peace in his own community. We find nothing in appellees' proof to indicate Guinn was known as a public official beyond the

---

[2] *See Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 91 S. Ct. 628 (1971); *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 91 S. Ct. 621 (1971); *Garrison* v. *Louisiana,* 379 U.S. 64, 85 S. Ct. 209 (1964).

confines of his region. *See Durham* v. *Cannan Communications, Inc.*, 645 S.W.2d 849, 850 (Tex. App.-Amarillo 1982, writ dism'd w.o.j.) (no proof submitted as to appellant's fame or notoriety in the community; appellant was not a public figure as a matter of law). We note the Kreps affidavit stated the reporter herself was not acquainted either with Guinn or his client (defendant Fuller), nor was Kreps aware of Guinn's elected status: "Prior to January 23, 1984, I had never heard of and did not know either Michael Blair Fuller or John B. Guinn."

We hold material fact issues were raised as to whether Guinn was a public official (or a public figure) within the purview of the *New York Times* actual malice standard. The summary judgment proof does not support the trial court holding that Guinn achieved either status as a matter of law. Guinn's first point of error is sustained.

Appellees' summary judgment motion attempts to establish the applicability to Guinn of the actual malice standard, and then to negate the existence of fact issues regarding actual malice. Because we have concluded appellees have not proved Guinn a public figure/public official as a matter of law, it is unnecessary to consider the existence of actual malice fact issues. *Foster* v. *Laredo Newspapers, Inc.*, 541 S.W.2d at 820; *Durham* v. *Cannan Communications, Inc.*, 645 S.W.2d at 851. We therefore do not address the merits of Guinn's second point of error.

Negligence has been adopted as the standard of liability in defamation actions by private individuals. Since appellees do not assert a right to summary judgment premised upon a negligence standard, we do not here determine whether the summary judgment proof negates negligence fact issues. *Foster* v. *Laredo Newspapers, Inc.*, 541 S.W.2d at 820; *Durham* v. *Cannan Communications, Inc.*, 645 S.W.2d at 851.

The judgment of the trial court is reversed and the cause remanded for trial.

/s/ George T. Ellis
Justice

Judgment Reversed and Opinion filed July 2, 1987. Panel consists of Justices Pressler, Murphy and Ellis.

Publish — TEX. R. APP. P.90.

JOHN B. GUINN,

Appellant,

v.

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC., MARY ANN KREPS, AND TEXAS NEWSPAPERS, INC. AND COX ENTERPRISES, INC. d/b/a/ WACO TRIBUNE-HERALD,

Appellees.

No. B14-86-674-CV.

Appeal from the 80th District Court
of Harris County
Trial Court No. 84-27303

JUDGMENT

This cause, an appeal from the judgment in favor of appellees, Texas Newspapers, Inc., Cox Enterprises, Inc., Mary Ann Kreps, and Texas Newspapers, and Cox Enterprises, Inc., d/b/a Waco Tribune-Herald, signed June 26, 1986, came on to be heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore order the judgment of the court below reversed and remand the cause for proceedings in accordance with the court's opinion.

We order appellees, Texas Newspapers, Inc., Cox Enterprises, Inc., Mary Ann Kreps, and Texas Newspapers, Inc. and Cox Enterprises, Inc. d/b/a Waco Tribune-Herald, to pay all costs incurred by reason of this appeal.

This decision is ordered certified below for observance.

Reversed and Remanded and Opinion filed July 2, 1987.

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 6, 1988

Mr. D. Mitchell McFarland
Mr. Robert J. King
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Houston TX 77002

Mr. P. M. Johnston
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Waco TX 76703

Mr. Minor L. Helm, Jr.
Sleeper, Johnston, Helm & Fontaine
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Mr. Michael B. Martin
Smith and Steele
Suite 830, Two Houston Center
909 Fannin at McKinney
Houston TX 77010

Mr. Wayne Fisher
Fisher, Gallagher, Perrin & Lewis
70th Floor, Allied Bank Plaza
1000 Louisiana
Houston TX 77002

RE: Case No. C-6770
STYLE: TEXAS NEWSPAPERS, INC. ET AL.
v. JOHN B. GUINN

Dear Counsel:

The application for writ of error in the above-styled case was this day denied with the notation, Writ Denied.

Chief Justice Phillips not sitting.

Respectively yours,
Mary M. Wakefield, Clerk
By /s/ BLANCA E. MORIN
Deputy

APPENDIX C

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

July 13, 1988

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70th Floor, Allied Bank Plaza
1000 Louisiana
Houston TX 77002

RE: Case No. C-6770
STYLE: TEXAS NEWSPAPERS, INC. ET AL.
v. JOHN B. GUINN

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectively yours,
Mary M. Wakefield, Clerk
By /s/ BLANCA E. MORIN
Deputy

APPENDIX D

Fourteenth Court of Appeals

J. CURTISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

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MARY JANE SMART
CLERK

HELEN A. CASSIDY
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August, 18, 1988

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Hon. Minor L. Helm, Jr.
Sleeper, Johnston, Helm & Fontaine
Post Office Box 770
Waco, TX 76703

RE: CASE NO. 14-86-00674-CV
TRIAL COURT CASE NO. 84-27303

STYLE: Guinn, John B.
V: Texas Newspapers, Inc., et al

Counsel:

Please be advised that on this date the Court GRANTED appellee's motion to stay the mandate in the above captioned cause; stay extended to and including November 16, 1988.

Respectfully yours,

MARY JANE SMART, CLERK

By /s/ CHARLENE MITCHELL
DEPUTY

APPENDIX E

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED: May 30, 1986. RAY HARDY, District Clerk, Harris County, Texas.

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80th JUDICIAL DISTRICT

NO. 84-27303

JOHN B. GUINN
VS.
TEXAS NEWSPAPERS, INC., *et al.*

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texas Newspapers, Inc., Cox Enterprises, Inc., d/b/a Waco Tribune-Herald and Mary Ann Kreps, Defendants in the above-captioned cause (hereinafter "Defendants"), and files their Motion for Summary Judgment. As grounds therefor, Defendants would respectfully show the Court as follows:

1.

Plaintiff, John B. Guinn, alleges a cause of action for libel as a result of a newspaper article that appeared in the Waco *Tribune-Herald* on January 24, 1984. As is shown by the pages of the deposition of the Plaintiff attached hereto as Exhibit "A", at the time said article was written, the Plaintiff was and is today a Justice of the Peace in Coryell County, Texas. As such, the Plaintiff is a public figure.

2.

Attached hereto is the Affidavit of Mary Ann Kreps, the reporter responsible for the Article in question. As is demonstrated in that Affidavit, at no time did she or did anyone else at the newspaper act with "actual malice" as that term has been defined by the Texas and United States Supreme Courts.

3.

The article complained of does not refer to the Plaintiff in his capacity as Justice of the Peace. However, the United States Supreme Court has stated that a charge of criminal conduct against an official, no matter how remote in time or place, is always relevant to his fitness for office for purpose of applying the rule requiring a showing of actual malice for recovery by a public office. *Monitor Patriot Company* v. *Roy*, 401 U.S. 265, (1971), *Ocala Star-Banner Company* v. *Damron*, 401 U.S. 295, 300 (1971). As such, Defendants are entitled to summary judgment herein.

WHEREFORE, PREMISES CONSIDERED, Texas Newspapers, Inc., Cox Enterprises, Inc., d/b/a Waco Tribune-Herald and Mary Ann Kreps, Defendants, pray that this Motion be set for hearing, that upon such hearing summary judgment be granted in their favor, that Plaintiff take nothing by reason of his suit, and that Defendants recover their costs, and for such other and further relief as may be appropriate.

Respectfully submitted,
LIDDELL, SAPP & ZIVLEY

By: /s/ D. Mitchell McFarland
D. MITCHELL McFARLAND*
By Laura Gibson
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Attorneys For Defendants
TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC., d/b/a WACO TRIBUNE-HERALD, and MARY ANN KREPS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on Plaintiff's attorneys of record, Mr. Shelton Smith, Smith & Cable, 8th Floor, Two Houston Center, Houston, Texas 77010, by hand delivery, on this 30th day of May, 1986.

/s/ D. Mitchell McFarland
D. MITCHELL MCFARLAND
*By Laura Gibson

EXHIBIT A

No. 84-27303

JOHN B. GUINN

VS

TEXAS NEWSPAPERS, INC.,
AND COX ENTERPRISES, INC.,
DBA WACO ENTERPRISES, INC.,
DBA WACO TRIBUNE-HERALD
and MARY ANN KREPS

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80TH JUDICIAL DISTRICT

DEPOSITION OF:
JOHN B. GUINN

all current.

Q. Have you ever been accused of some fraud or deceit?

A. Maybe by some old girl friends at sometime, but in the legal sense, never.

Q. Ever filed for bankruptcy?

A. No.

Q. Ever been elected to public office?

A. Yes.

Q. What?

A. Two years ago I was elected justice of the peace, Precinct 1, Coryell County. To finish that, I had served in that capacity since 1981. I was appointed to fill an unexpired time.

Q. You were appointed in 1981?

A. Yes.

Q. And you were reelected when?

A. Two years ago in the general election.

Q. In 1981?

A. November of '81.

Q. And then you served until the end of 1983?

A. I am still serving.

Q. You are a justice of the peace of Coryell County now?

A. Yes.

Q. You were justice of the peace of Coryell County when the article was written?

A. Yes.

Q. And what salary do you receive for that position?

A. Approximately $12,000 a year.

Q. Are you running for reelection this year?

A. No.

Q. Your term is —

A. They are four year terms.

Q. So you are term will expire in?

A. 1986.

Q. Do you intend to run for reelection?

A. I have no idea.

Q. Do you have any aspiration for any other political office?

A. Not really.

Q. Have you ever been appointed to any other office other than the justice of the peace position?

A. I am currently and have been for some time an associate city judge. I serve when the city judge or the municipal judge is unavailable.

Q. For Copperas Cove?

A. Yes.

Q. And what do you preside over in that capacity?

A. The municipal court when I sit.

Q. And how long have you been an associate city judge?

A. I believe, Mr. McFarland, since the latter part of 1980. Sometime before I was appointed as J.P., a few months anyway.

Q. And you currently hold that position?

A. Yes.

Q. And you held that position when the article was written?

A. Yes.

Q. And what kind of salary do you receive for that?

A. $400 a month.

Q. A month?

A. A month. I am contract labor.

Q. Other than that position, have you ever been pointed to any other public offices?

A. I have served in the past on the Coryell County Child Welfare Board. It has been a number of years since I served on that body.

Let me think for just a moment. I served as counsel for the Charter Commission, the City of Copperas Cove.

Q. Were they drafting a new charter?

A. A charter. Copperas Cove was the largest general law city in the state until the charter was adopted. I believe that was in '79.

I can't recall any other — I can't recall any other public functions.

Q. What about any other boards or commissions or anything like that?

A. And you are speaking only in the public sector? You are not including the Rotary Club or anything like that?

Q. I will get to that.

Any other boards or commissions?

A. Not that I can.

Q. How about the bar activities?

A. I served as an official in our Coryell County Bar.

Q. What designation?

A. Treasurer. That was last year.

Q. You are not that currently?

A. No, sir.

Q. That expired at the end of the year?

A. I believe that we operate from July to

EXHIBIT B

No. 84-27303

JOHN B. GUINN

VS.

TEXAS NEWSPAPERS, INC., *et al.*

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80TH JUDICIAL DISTRICT

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS
COUNTY OF MCLENNAN

BEFORE ME, the undersigned authority, personally appeared MARY ANN KREPS, known to me to be the person whose name is subscribed to the foregoing instrument, and being by me first duly sworn, did depose and state:

My name is MARY ANN KREPS, I am over 21 years of age, I have not been convicted of a felony, and I have personal knowledge of the facts and matters stated herein. I am currently an employee of Texas Newspapers, Inc., a division of the Cox Enterprises, Inc., the publisher of the *Tribune-Herald* in Waco, Texas.

In January 1984, I was working as a reporter for the *Tribune-Herald.* As a part of my duties, I covered the county and federal courthouses. In dealing with matters at the federal courthouse, I would contact the federal clerk's office a few times each week to ask what, if anything, was going on that might be of interest to the newspaper. Depending on the response, I would then go to the clerk's office or the court to observe or report on those matters. As of January 23, 1984, the newspaper had been interested in a matter involving the Farmers Home Administration and as such I was at the federal clerk's office on that day. On that day, several gentlemen

pled guilty to charges relating to a conspiracy to steal $80,000.00 from the Farm Home Administration.

In addition to reporting on the matters relating to the theft, I included in my story other matters that happened in court that day. In reporting on those matters, I reviewed files kept by the clerk to obtain specific data regarding each case. Included in those files is a form which includes pertinent data naming the party, the attorneys, and the sentence imposed in each case. This sheet was generally located on the left side of the file and would generally not be the first page on top of the file. I reviewed this information, transcribed notes onto a notebook for later use.

Using this procedure, I reviewed the file involving Michael Blair Fuller. I inadvertently and unintentionally transcribed the name of his lawyer, John B. Guinn, as that of the defendant. Prior to January 23, 1984, I had never heard of and did not know either Michael Blair Fuller or John B. Guinn. I had no knowledge of either of them at that time except what was disclosed upon my review of the court's file. In reporting the story that appeared in the January 24, 1984 edition of the *Tribune-Herald,* I had no intention of damaging the reputation of Mr. John B. Guinn.

The forms from which I obtained the data to report the story that appeared on January 24, 1984 are generally reliable. They generally contain accurate information of court proceedings. After the article was published, I found that I had made a mistake in reporting his name instead of that of his client, Michael Blair Fuller. In reporting that article, I relied on my notes taken in transcribing data which I believed to be accurate and true. I believed that I had fairly and accurately taken the information from the court's records. I had no awareness of the mistake I had made and did not entertain any doubt as to the truth of the publication at

the time it was published. Only upon being informed of the error, did I realize the mistake I had made.

/s/ Mary Ann Kreps
MARY ANN KREPS

SUBSCRIBED and SWORN TO BEFORE ME on this 28th day of May, 1986.

/s/ Patsie D. Cunningham
Notary Public in and for
the State of Texas

Patsie D. Cunningham
Notary Public
State of Texas

My Commission Expires February 24, 1988

APPENDIX F

FINAL JUDGMENT, SIGNED: June 26, 1986. ENTERED: Volume 3357, Page 704, General Minutes, district Courts, in and for Harris County, Texas.

No. 84-27303

JOHN B. GUINN
VS.
TEXAS NEWSPAPERS, INC., *et al.*

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80TH JUDICIAL DISTRICT

JUDGMENT

CAME ON TO BE HEARD Defendants' Motion for Summary Judgment and the Court, having considered same, is of the opinion that said motion should be granted; it is, therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff, John B. Guinn, take nothing by reason of this lawsuit, and that all costs incurred herein are adjudged against Plaintiff for the payment of which let execution issue.

SIGNED this 26 day of June, 1986.

/s/ William R. Powell
JUDGE PRESIDING

APPROVED AS TO FORM:

LIDDELL, SAPP & ZIVLEY

BY: /S/ D. MITCHELL MCFARLAND
D. MITCHELL MCFARLAND
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Attorneys for Defendants
TEXAS NEWSPAPERS, INC., COX
ENTERPRISES, INC., d/b/a WACO
TRIBUNE-HERALD, *and* MARY ANN KREPS

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-631 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC. d/b/a "WACO TRIBUNE-HERALD," AND MARY ANN KREPS,
Petitioners,

v.

JOHN B. GUINN,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

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1988

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE TEST OF ACTUAL MALICE UNDER *NEW YORK TIMES V. SULLIVAN* APPLIES TO PUBLIC OFFICIALS NOT KNOWN OUTSIDE THE CONFINES OF THEIR COMMUNITY.

2. WHETHER A DEFAMATORY STATEMENT MUST EXPRESSLY OR IMPLIEDLY IDENTIFY AN INDIVIDUAL AS A PUBLIC OFFICIAL BEFORE THE ACTUAL MALICE STANDARD CAN APPLY.

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NO. 88-631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC. d/b/a "WACO TRIBUNE-HERALD," AND MARY ANN KREPS,
Petitioners,

v.

JOHN B. GUINN,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

Respondent files this response to Petitioners' Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas ("Texas Court of Appeals") in No. B14-86-674-CV issued on July 2, 1987. This response is filed pursuant to the Court's instruction that a written response be filed on or before December 30, 1988.

COUNTERSTATEMENT OF THE CASE

1. Factual and Procedural Background

This appeal involves the application of the First Amendment as interpreted by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) (*New York Times v. Sullivan*), *Monitor Patriot v. Roy,* 401 U.S. 265 (1971), and *Oscala Star-Banner v. Damron,* 401 U.S. 295 (1971). The question before the Court is whether the test of actual malice under *New York Times v. Sullivan* applies to all public officials, at all times, in all places, as a matter of law.

At the time of the publication of the defamatory article in question, Respondent, John B. Guinn, was an elected Justice of the Peace in Coryell County, Texas, an appointed municipal court judge in Copperas Cove, Texas, and a practicing attorney and member in good standing of the State Bar of Texas. There is no dispute that Judge Guinn was and remains a *per se* public official in his hometown.

This lawsuit and subsequent appeal was filed after the Petitioners, Texas Newspapers, Inc., Cox Enterprises, Inc. d/b/a "Waco Tribune Herald" and Mary Ann Kreps, published a newspaper article which falsely reported that Judge Guinn had been convicted of felony theft. The article inaccurately reported that Judge Guinn had been convicted and sentenced to five years probation:

> John B. Guinn, 44, of Copperas Cove was given a five year probated sentence and ordered to pay restitution for theft on a government reservation.

The publication of this obvious falsehood occurred due to the confusion of Judge Guinn's name with that of Michael B. Fuller, the defendant for whom Respondent had acted as counsel.

This patently libelous news article was written by Petitioner, Mary Ann Kreps, who was responsible for reporting the legal proceedings for both state and federal courts in the Waco area. At the time the article appeared, Judge Guinn was serving as the Justice of the Peace for Coryell County and was also an appointed Associate City Judge presiding in Copperas Cove, Texas.[1] However, the circumstances which led to the article's publication had nothing to do with Guinn's responsibilities as a judge. These events were negligently reported while Judge Guinn was acting as a private attorney retained to defend Fuller.

Judge Guinn then brought suit against the Petitioners to recover actual and punitive damages for defamation. Petitioners were granted a summary judgment in Texas District Court based upon Guinn's deposition testimony which acknowledged that he served in several capacities as a local judge in Copperas Cove. This testimony served as the basis for the Trial Court's conclusion that Petitioner was a public official and therefore subject to the actual malice standard of *New York Times v. Sullivan.*

Respondent appealed to the Texas Court of Appeals, Fourteenth Supreme Judicial District, which reversed and remanded the case for trial. The Texas Supreme Court

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1. As noted in Petitioners' Brief, Copperas Cove in Coryell County is the home of Judge Guinn. Guinn's hometown and the Court in which he sits is located approximately 100 miles from Waco.

denied Petitioners' application for writ of error and overruled their motion for rehearing.

2. The Holding of the Texas Court of Appeals

On appeal, Respondent did not dispute that he was, in fact, a *per se* public official by virtue of his holding a government office. However, the Court of Appeals correctly recognized that Respondent's status as a "public official" did not mandate automatic application of the actual malice standard under *New York Times v. Sullivan.*

The Texas Court of Appeals held that there was no proof that Guinn was known outside the confines of his community. *Durham v. Cannan Communications, Inc.,* 645 S.W.2d 849, 850 (Tex. App.—Amarillo 1982, writ dism'd w.o.j.). The Court of Appeals limited the application of the *New York Times v. Sullivan* rule, based upon the fact that the libelous statements were made in a metropolitan area over 100 miles away from Judge Guinn's hometown. The Court of Appeals correctly held that a fact issue existed as to whether the Petitioners could invoke the *New York Times v. Sullivan* rule in these particular circumstances.

The Court further recognized that because the content of the news article did not mention nor relate to Guinn's official conduct as a judge, nor did the article relate to Guinn's performance of his official duties, Guinn was not a public official for purposes of *New York Times v. Sullivan. Foster v. Laredo Newspapers, Inc.,* 541 S.W2d 809, 814-15 (Tex. 1976), *cert. denied* 429 U.S. 1123 (1977).

The Court of Appeals then concluded that as a matter of law, the *New York Times v. Sullivan* rule cannot be

automatically applied in all circumstances to all public officials. The Court held that factual questions relating to the context in which the defamatory remarks are published and the circumstances of the public official's status in the region must be addressed before applying the *New York Times v. Sullivan* rule of actual malice.

REASONS FOR DENYING THE WRIT

The holding of the Texas Court of Appeals supports the proposition that absolute immunity for political libel is not allowed under the First Amendment. This Court has previously suggested that the actual malice rule under *New York Times v. Sullivan* should not be automatically applied in all public official defamation cases. *Oscala Star-Banner Co. v. Damron,* 401 U.S. 295 (1971).

Respondent agrees that the First Amendment must preserve the right of the press to freely report and criticize the conduct of public officials. However, the First Amendment should not allow the press to, *carte blanche,* impugn the reputation of any public official, in any place, at any time, for any reason, no matter what the circumstance.

This Court has the opportunity to affirm the Texas Court of Appeals' determination that the actual malice standard under *New York Times v. Sullivan* should not be applied as a matter of law in all defamation cases involving elected public officials. There are certain factual inquiries which should serve as a predicate to application of the actual malice standard. At the minimum, it should be determined that the libelous statement was published in an area or region where the complainant serves as a public official, or where he is at least generally known to be a public official.

Clearly, a minor office-holder in a remote and rural county should not automatically be considered a public official in a distant metropolitan area, for purposes of triggering application of the *New York Times v. Sullivan* rule. Otherwise, all such *de facto* "public officials" would be fair game for any newspaper in the country to freely defame such a person then hide behind the protective rule of *New York Times v. Sullivan* by asserting that the defamed was, for all purposes, in all places, and at all times a "public official."

Furthermore, if the libelous news article fails to expressly identify or refer to such a minor office-holder in his official capacity and does not associate him with his office, then the defamed should not automatically be a "public official" for purposes of *New York Times v. Sullivan*. This Court should overrule Petitioners' writ in light of previous holdings indicating that the actual malice standard may not always apply in public official defamation cases.

1. A Public Official Must Be Known Outside The Confines Of His Community Before The Actual Malice Standard Can Apply.

Judge Guinn contends that although he was an elected judge in his home county, he most certainly was not a public official or public figure in the Waco metropolitan area located over 100 miles away. This fact issue is best illustrated by the Petitioner, Mary Ann Kreps, (the courthouse reporter and author of the article in question) who admitted under oath that "[P]rior to January 23, 1984, I had never heard of and did not know either

Michael Blair Fuller or John B. Guinn." *See* Petitioners' Appendix A, Exhibit B, p. 23a.

In support of their Petition, Petitioners cite Justice Stewart's opinion in *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1970), wherein the Court held that, as a matter of constitutional law, "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times v. Sullivan.*" *Id.* at 277. However, the Court in *Monitor* did not hold that a false charge of criminal conduct is *dispositive* of the issue, only that it can never be "irrelevant" for procedural or evidentiary purposes. *Id.*

Despite the "relevancy" of this evidentiary inquiry, a person's status as a public official is not determinative of whether the actual malice standard should apply. Allegations of criminal conduct may be relevant to the defamation proceeding, but this allegation alone does not mandate application of *New York Times v. Sullivan.* There must be a factual inquiry into whether the official is known or perceived to actually be a public official in the community where the libelous statements are made.

The Court has recognized that application of the *New York Times v. Sullivan* rule is not absolute and that there may be situations where public officials are not subject to the burden of the actual malice rule. In *Monitor Patriot,* Justice Stewart wrote:

> Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness

> for the office he seeks. The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel. *But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case.*

Id. at 275 (emphasis added).

Clearly, there remains that unanswered question as to whether there is a particular circumstance where the press should not properly be afforded the almost impenetrable veil of constitutional protection under the actual malice standard of *New York Times v. Sullivan.* Respondent vigorously contests the issue that is most often not even contested in public official defamation cases: whether an elected government office-holder is invariably a "public official," at all times, in all places, and in all circumstances so as to automatically trigger the actual malice standard of *New York Times v. Sullivan.*

Respondent urges the Court to recognize the reality that a minor office-holder, who is not identified and certainly not known as a public official outside the confines of his community, should not automatically be subject to the actual malice standard when he is defamed by a newspaper in a distant city.

Petitioners may plead and they may attempt to prove by competent and credible evidence that a Coryell County Justice of the Peace and City Judge is in all places a public official, but they should not be permitted to assume this advantage as a matter of law. The issue of whether Judge Guinn is a public official in Waco, or Houston, or New York is a fact question that must properly be determined by a jury.

2. Defamatory Statements Must Expressly Or Impliedly Identify The Individual As A Public Official.

Because no reference was made in the libelous article that John Guinn was a judge or that he was acting in his official capacity, the actual malice rule should not apply.

Inquiry into whether reference to a public official's "official capacity" is required in political libel cases was invited by this Court in *Oscala Star-Banner v. Damron,* 401 U.S. 295 (1971). In *Oscala,* the plaintiff, who was mayor and candidate for county tax assessor, filed a libel action against a local newspaper as a result of an article which falsely stated he had been indicted on perjury charges in Federal Court. Like the present case, the article referred to plaintiff individually but made no mention that he was a public official. Although this Court held the *New York Times v. Sullivan* rule was applicable, it further observed:

> Both the trial judge on motion for new trial and the District Court of Appeals rested their conclusion that the *New York Times* rule did not apply partly on the ground that the defamatory article nowhere mentioned the respondent's status as Mayor of Crystal River or as candidate for County Tax Assessor. The Defendant has not pursued this theory here.

Id. at 300, n. 4.

The *Oscala* footnote suggests this Court's willingness to recognize an exception to the *New York Times v. Sullivan* rule no different from the invitation asserted by

Justice Stewart in *Monitor Patriot Co. v. Roy,* 401 U.S. at 275. This observation is further highlighted by the unique factual circumstances of both *Oscala* and the case at bar. Both *Oscala* and the present case deal with situations where no reference is made to a public official's position or the performance of his duties. On the other hand, almost every other Supreme Court case applying the *New York Times v. Sullivan* rule involved libelous statements which specifically identified the public official and the performance of his duties.[2]

Furthermore, the Texas Supreme Court decision which was controlling in the Court of Appeals held that the *New York Times v. Sullivan* rule did not apply if the newspaper article failed to specify that the plaintiff was a public official or that he was acting in his official capacity. *Foster v. Laredo Newspaper, Inc.,* 541 S.W.2d 809 (Tex. 1976). In *Foster,* the Texas Supreme Court held that because no express reference was made to Foster's official position "the allegedly libelous state-

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2. *See e.g. Beckly Newspaper Co. v. Hanks,* 389 U.S. 81 (1967) (published statements applied to candidate in political campaign); *St. Amant v. Thompson,* 390 U.S. 727 (1968) (published statements related to County Sheriff accused of criminal conduct in the course of duty); *Monitor Patriot v. Roy,* 401 U.S. 265 (1971) (publication related to a senatorial candidate's activity as a former bootlegger); *Rosenblatt v. Baer,* 383 U.S. 75 (1966) (article referred to County Ski Supervisor's official duties and implied that he embezzled funds); *Times v. Pape,* 401 U.S. 279 (1971) (report on police violence related to police commissioner's official conduct); *Garrison v. Louisiana,* 379 U.S. 64 (1964) (statements of criminal conduct related to District Judge's official duties); *Henry v. Collins,* 380 U.S. 64 (1964) (accusations that a County Attorney and Chief of Police were involved in a 'diabolical plot' related to the official duties of each public official).

ments did not concern Foster's 'official conduct' ". *Id.* at 815.[3]

This Court's denial of certiorari in the *Foster* decision suggests that the exception to the actual malice standard is consistent with this Court's precedent in *New York Times v. Sullivan.*

The policy behind the actual malice rule of *New York Times v. Sullivan* has been to cultivate free and open debate of public issues through the press. The actual malice standard guarantees that "the government remains responsive to the will of the people by allowing open scrutiny of a public official in the execution of his duties." *New York Times v. Sullivan,* 376 U.S. at 269.

These constitutional interests are not served when the press does not inform the public that the reported unlawful conduct was that of a public official. Scrutiny of governmental affairs can never be served if the public is unaware that the defamed individual was a public office holder. No goal toward the "ascertainment of truth" of a public official's conduct will be obtained if the public believes that the "public official" is a private person.

A factual inquiry must be made into whether the defamatory statements relate to a public official's official duties or whether these statements are perceived by the

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3. Respondent recognizes there may be some instances where the absence of an express reference to an individual's official capacity is unimportant. Certainly there may be instances where a public official is so well-known that the general public automatically associates him with his office. Respondent does not believe that such a situation exists in this case but would, nevertheless, assert that this determination is, at the very least, a fact question for the jury.

community as being associated with a public official's competency and office. Only then should a public official be subject to the actual malice standard.

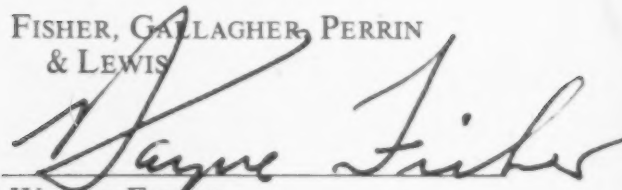
The actual malice rule should not protect the press from accountability for publication of any falsehood about any public official, at any time, in any place. To hold otherwise would serve to destroy a public official's right to protect his private reputation from unjustified invasion and irreparable damage. It would also mean that no public official, however minor his position or remote his station, would ever have a viable cause of action for defamation. This should not be the law.

CONCLUSION

The holding of the Texas Court of Appeals is consistent with the policy and intent of the actual malice standard under *New York Times v. Sullivan.* Although this Court has not yet directly addressed this particular issue, the invitations suggested by this Court in *Monitor Patriot v. Roy* and *Oscala Star-Banner Co. v. Damron,* indicate that the Court of Appeals' holding is consistent with the principles of the First Amendment of the United States Constitution. Respondent therefore respectfully requests this Honorable Court to uphold the Texas Court of Appeals' ruling that the actual malice standard does not apply to all public officials as a matter of law.

Respectfully submitted,

FISHER, GALLAGHER, PERRIN
& LEWIS

By: 

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel of record on this the 29 day of December, 1988.

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